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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 741

ELBERT MOORE, INC.
a Florida Corporation

Petitioner,

vs.

HONORABLE RAY E. GREEN,
as Comptroller of the State of Florida

Respondent

Petition For A Writ Of Certiorari To The Supreme Court Of Florida

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FREE PRESS PUB. CO. INC. - TAMPA, FLA.

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Petitioner,

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HONORABLE RAY E. GREEN,
as Comptroller of the State of Florida

Respondent

Petition For A Writ Of Certiorari To The Supreme Court Of Florida

Petitioner, Elbert Moore, Inc., a Florida corporation, prays that a writ of certiorari issue to review the decision and judgment of the Supreme Court of Florida in this case on July 8, 1964 and September 10, 1964, wherein Elbert Moore, Inc., Petitioner was Petitioner and Honorable Ray E. Green as Comptroller of the State of Florida was Respondent.

OPINIONS BELOW

The Declaratory Decree, containing the opinion of the trial court, (R-10) is unreported and is printed in Appendix B1, hereto, infra p. 12. The decision and judgment of the District Court of Appeal of Florida, First District (R-18) printed in Appendix B2, hereto, infra p. 17, is reported in 156 So. 2d 397. [1] The decision and judgment of the Supreme Court of Florida (R-36) printed in Appendix B3, hereto, infra p. 21, is reported in 166 So. 2d 794.

JURISDICTION

The decision and judgment of the Supreme Court of Florida was entered on July 8, 1964, (R-36) (Appendix B3, p. 21, infra). Rule 3.14 Florida Appellate Rules authorizes the filing of a Petition for Rehearing within 15 days of the decision of the Court in question. On July 20, 1964, the Petitioner here, Petitioner there, filed a timely Petition for Rehearing (R-37) which on September 10, 1964, was denied (R-37) (Appendix B3, p. 21, infra). The jurisdiction of this Court is invoked under 28 USC § 1257, since the decision of the Florida Court upheld an unapportioned Florida sales tax on vehicle rent earned outside the State of Florida, notwithstanding the immunity from out-of-state taxation granted to Interstate Commerce by Clause 3 of Section 8 and Clause 2 of Section 10 of Article I of the Constitution of the United States.

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[1] On December 12, 1963, Petitioner filed a Petition for Certiorari in this Court, Number 671, October term 1963, because of a possibility that the District Court of Appeal of Florida, First District was the highest Florida Court in which a decision could be obtained. On February 17, 1964, this Honorable Court denied the Petition and on the same day the Supreme Court of Florida granted the Petition for Certiorari filed therein (R-36) (Appendix B3, infra p. 21), thus becoming the highest Florida Court to rule on this case.

QUESTION PRESENTED

Whether a truck lease, basing rent solely on the number of miles driven, links the lease executed in Florida, to both intra-state and inter-state use, so as to prevent Florida sales tax from applying to the portion of rent earned from out of state mileage, in view of Clause 3 of Section 8 and Clause 2 of Section 10 of Article I, Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sections 212.05 (3) and 212.08 (3) Florida Statutes 1959, (Florida Revenue Act of 1949), and Clause 3, Section 8 and Clause 2, Section 10 of Article I, United States Constitution are set forth in Appendices A1, 2, 3 and 4, infra, pp. 9-11.

STATEMENT

The Petitioner is a Florida corporation that leases trucks to another Florida corporation which uses the trucks to transport lessee's goods from middle and western states to Florida and other persons' commodities that are exempt from ICC regulations, from Florida to the Middle and Western States. Rent is paid on a mileage basis. (See Appendix C-2 infra p. 27 for documentation of the mileage basis) The respondent Comptroller of Florida has assessed an unapportioned Florida sales tax (Chapter 212 Florida Statutes) against the entire rental, both that for miles driven in Florida and that driven in other states. (R-2, 4, 9) (Appendix B1, infra, p. 12).

The petitioner filed suit on October 28, 1960 in the Circuit Court of the Second Judicial Circuit in and for Leon County (Court of first instance) pursuant to Chapter 87 Florida Statutes 1959 seeking a Declaratory Decree on the assessment (R-1) which by paragraph E of the Amendment to Complaint filed April 7, 1961, (R-5) (Appendix C-1a, infra p. 22) questioned the taxing of the rent derived outside the State of Florida.

After a final hearing the following year, the Circuit Judge in the second portion of his Declaratory Decree filed October 30, 1962, attempted to distinguish the intra-state, inter-state apportionment principle of *Central Greyhound vs Mealey* 334 US 653 as not applying to this case (R-13, 14) (Appendix B1, infra p. 15.)

Point II of the Petitioner's Brief in the District Court of Appeal of Florida, First District (R 24, 26,) (Appendix C1b, infra p. 22) reasserted this contention, but the District Court of Appeal of Florida stated the contention was without substantial merit. (R-22) (Appendix B2, infra p. 20).

Paragraphs 5, 6 and 7 of our Petition for Certiorari in the Supreme Court of Florida carried this contention to the Supreme Court of Florida by way of conflict between the decision of the Court of Appeal in our case and an earlier decision of the Supreme Court of Florida in *Green v. Western Union* (Fla. 1960) 123 So. 2d 712 which was based on *Central Greyhound vs. Mealey* 334 US 653 (R-26-31) (Appendix C1d, pp. 23-27). The question in the Supreme Court of Florida was practically identical with the one here and in the District Court of Appeal. (R-40) (Appendix C1c, infra p. 22).

REASONS FOR GRANTING THE WRIT

1. The Florida Courts ruled erroneously because the rent is not a flat charge having no connection with use. It is instead, directly tied to use, because rent is computed on the number of miles driven. (R-18) (Appendix C2, infra p. 27) (P. 398 of 156 So. 2d). If this were a flat rate rental in which use did not figure, the transaction would be solely intrastate and subsequent use would be irrelevant. *Eastern Air Transport vs. South Carolina Tax* 285 US 147. It is, however, not a flat rate rent, isolable as a complete intrastate contract and transaction on signing of the lease and delivery of the trucks, (e.g. the usual real estate lease) because consideration is determined subsequently and solely by use. That is to say, no use (mileage), then no rent.

Semantically, petitioners receipts are closer to royalty than rent. *Logan Coal and Timber Association vs. Helvering* (3 CCA 1941) 122 Fed 2d 848, 850; Webster's New International Dictionary of the English Language (Second Edition) 2178 "royalty" 7.

Chapter 212.05 (3) Florida Statutes (Florida Revenue Act of 1949) taxes the privilege of renting tangible property in Florida. (Appendix A3, infra, pp. 9, 10,). Being paid rent on mileage run out of Florida is not a privilege exercised in Florida. Florida's fair share is the right to tax the Florida mileage proceeds. *Central Greyhound vs. Mealey* 334 US 653, required New York to apportion, to the New York mileage, its tax on bus ticket proceeds for runs, originating and terminating in New York, but passing through Pennsylvania and New Jersey. It is this apportionment principle which petitioner here seeks. Naturally, petitioner would be liable to any other state for the mileage driven through it. Although petitioner's case arises under a so-called "Sales Tax" chapter and *Central Greyhound vs. Mealey* 334 US 653 concerned a "gross receipts tax", there is no distinction because Florida taxes rent on "gross proceeds", Section 212.05 (3) Florida Statutes (Appendix A3, infra P. 10). This Court has always required that the real effect of a tax be studied rather than its labels: *J. D. Adams vs. Storen* 304 US 307; *State of Wisconsin vs. J. C. Penny* 311 US 435. So also, it matters not who pays the Florida tax, since lessee pays and lessor recives rent specifically and directly because of out of state use.

Petitioner's need for redress is heightened by the courts below, not addressing themselves to the apportionment question when it was squarely before them.

2. This is a federal question of substantial and growing importance. The vehicular leasing business is expanding. Three other states have had to wrestle with cases fairly similar to Petitioner's. *Oxford vs. Blankenship,* 106 Georgia Appeals Reports 546; *Alside vs. Bowers,* 174 Ohio State Reports 463; *Central Transportation*

Co. vs. Z. D. Atkins 202 Tennessee Reports 512. [2] A reading of these opinions shows an unsettled lack of uniformity among the state views on how to distinguish between interstate and intrastate. Petitioner's factual case affords a classic framework for careful elaboration and exposition of the criteria to use in all lease cases. Absent such a guidance by this Honorable Court, equipment lessors face being burdened with multiple state taxation. That such multiple state taxation would be burdensome in our case is evidenced by the numerous out-of-state trips made each year under the admitted facts (Appendix C4, infra, p. 29) (R-2 & 4), and the economic loss which the District Court noted would be suffered if the trips from Florida to the Midwest were made empty. (Appendix B2, infra, pp. 18 and 20) (R-19 and 21).

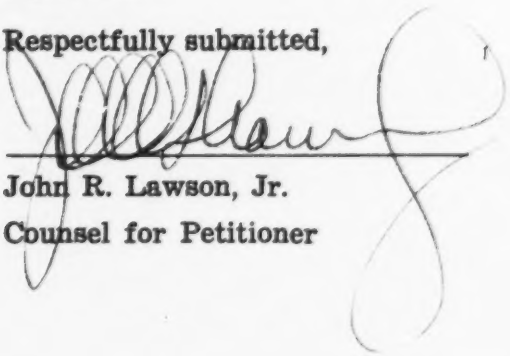
---

[2] The latter case was the subject of a Petition for Certiorari to this Court which was denied, *Central Transportation Co. vs. Z. D. Atkins*, 355 US 913, however, a reading of the questions presented by the petition (filed November 29, 1957, Case No. 630 October term, 1957) indicates an apportionment of the tax between interstate, intrastate proceeds, was not sought. (Appendix C3, infra pp. 28, 29)

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



John R. Lawson, Jr.

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Petition for Writ of Certiorari have been served by mail upon James W. Kynes, Attorney General State of Florida and Gerald Mager, Assistant Attorney General State of Florida, Attorney for the Respondent at the Capitol Building, Tallahassee, Florida this 2nd day of December, 1964

JOHN R. LAWSON, JR.

APPENDIX A

1.

Clause 3 of Section 8 of Article I of the Constitution of the United States:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2.

Clause 2 of Section 10 of Article I of the Constitution of the United States:

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the Net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress.

3.

Excerpts from Section 212.05 *Florida Statutes* 1959: (Florida Revenue Act of 1949; Laws of Florida 1949 chap. 26319, Sec. 5).

212.05 Sales, storage, use tax

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state. For the exercise of said privilege a tax is levied as follows:

* * * *

(3) At the rate of three per cent of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, except the rental of motion picture film, where the lease or rental of such property is an established business or part of an established business, or the same is incidental or germane to said business.

(4) At the rate of three per cent of the lease or rental price paid by lessee or rentee, or contracted or agreed to be paid by lessee or rentee, to the owner of the tangible personal property.

(5) The said tax shall be collected from the dealer as defined herein and paid at the time and in the manner as hereinafter provided.

(6) The tax so levied is and shall be in addition to all other taxes, whether levied in the form of excise, license or privilege taxes, and shall be in addition to all other fees and taxes levied.

4.

Excerpts from Section 212.08 *Florida Statutes* 1959: (Florida Revenue Act of 1949; Laws of Florida 1949; Chap. 26319, Sec. 8; amended by Laws of Florida, 59-287; Laws of Florida, 57-1971)

212.08 Same; specified exemptions

The sale at retail, the rental, the use, the consumption, the distribution and the storage to be used or consumed in this state, of the following tangible personal property, is hereby specifically exempt from the tax imposed by this chapter.

* * * *

(3) Exemptions, partial; motor vehicles.—There shall be exempt from the tax imposed by this chapter so much of such tax as shall exceed one per cent (1%) on the sale (including occasional or isolated sales or rental to, the use, consumption or storage for use in this state of motor vehicles. No title certificate shall be issued by

the Motor Vehicle Commissioner on any motor vehicles unless there be filed with such application for title certificate a receipt issued by an authorized motor vehicle dealer, or by the comptroller evidencing the payment of such tax where the same is payable. No such receipt shall be required upon application for transfer of any title certificate issued by another state having a sales tax equal to or greater than the tax required by his state and requiring such tax to be paid before the issuance of a title certificate. Other provisions of this chapter relating to tradeins are applicable to motor vehicles; however, all transfers of title to motor vehicles are presumed to be a taxable transaction until otherwise shown. The term "motor vehicles" as used in this subsection shall have the same meaning ascribed in § 320.01(1), when used in the plural form; however, any vehicle required to be licensed under § 320.08, with a "GW" series tag shall not be construed to be a motor vehicle under the provisions of this subsection and is taxable at the rate of three per cent (3%). The term "motor vehicle dealer" as used in this subsection shall have the same meaning ascribed in subsection (6) of Sec. 320.60, Florida Statutes.

APPENDIX B

1. (R-10)

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND FOR
LEON COUNTY, FLORDA

1.

ELBERT MOORE, INC., a
Florida Corporation,
Plaintiff,

No. 17263

-vs-

RAY E. GREEN, as Comptroller
of the State of Florida, et al.

Defendant.

DECLARATORY DECREE

Plaintiff is engaged in the business of leasing trucks to others. It has leased trucks to Lykes Bros., Inc., a Florida corporation. The defendant, the Comptroller of the State of Florida, has assessed against plaintiff a tax based upon the amount of rentals accuring under the leases from plaintiff to Lykes Bros., pursuant to Chapter 212, Florida Statutes, but the plaintiff contests the validity of the assessments and has brought this suit seeking a declaration determining the validity of the levy.

Plaintiff's claim of exemption from the taxes is based upon the use to which the trucks are put by Lykes Bros. It appears that in the course of its business Lykes Bros. acquires large amounts of property in the middle and western states which it desires to haul by truck to points in Florida. It does not have property of its own which it desires to move in the opposite direction. Consequently, the trucks which haul this property

to Florida will return empty if some arrangements are not made for the hauling of the property of others. Lykes Bros., Inc. has qualified in several states as a contract carrier. The trucks rented from plaintiff have been operated to and from the sources of Lykes Bros., Inc., property in the middle and western states, hauling property owned by Lykes Bros. in one direction and (as a contract carrier) hauling the property of others in the other direction. It is rarely, if ever, that a truck makes a round trip exclusively in the hauling of Lykes Bros property, or exclusively as a contract carrier. Plaintiff is paid by Lykes Bros., partly on mileage basis, the rental covering all maintenance, gasoline and oil for the trucks and even tolls paid.

Based on this factual situation, plaintiff contends that it is not liable to taxation under Chapter 212, Florida Statutes, for three reasons:

1. That it is exempt by the terms of the statute.

2. That the tax is invalid as an imposition upon interstate commerce prohibited by the third clause of Section 8 of Article I of the Constitution of the United States.

3. That the tax is invalid as an income tax in violation of Section 11, Article IX of the Constitution of Florida.

These arguments will be considered in the order stated.

IS PLAINTIFF EXEMPT FROM THE TAX BY THE TERMS OF THE STATUTE?

Section 212.08 (7), Florida Statutes provides in part as follows:

"Also exempt are vehicles and parts thereof used to transport persons or property in interstate or foreign commerce."

Standing alone this language is susceptible to the construction that it would exempt the plaintiff from payment of the tax in question. But the Supreme Court has held unequivocally that

> "The words 'used to transport passengers or property in interstate and foreign commerce' has reference to a public business of transport for value, or what is generally understood by the term 'common carrier'." L. B. Smith Aircraft Corp. v. Green, 94 So. 2d 832.

Plaintiff is not, nor is Lykes Bros., Inc., a common carrier of freight or passengers, nor are the trucks in question being used as a part of any system of common carriage.

But even if we place a more restricted construction on the Supreme Court decision and adopt the conclusion that the statute was intended to exempt contract carrier as well as common carriers, it would be unreasonable to extend its operation to the trucks under consideration. Lykes Bros., Inc. uses the trucks for the purpose of performing contacts of carriage only as an incident to the main business of that corporation and only for the purpose of avoiding the economic waste which would follow from permitting the trucks to move one way empty on every round trip *when the round trip is made for the purpose of promoting the strictly private business of Lykes Bros., Inc.* Certainly the Legislature did not intend that every truck which is ever used for a single movement of property in interstate commerce would be forever exempt from taxation under the statute. The word "used" as employed in the statute was intended to convey the meaning of more than a temporary of part time use. Certainly the incidental use shown here is not sufficient to come within the legislative intent.

IS THE TAX INVALID AS IMPOSING UNDULY UPON INTERSTATE COMMERCE IN VIOLATION OF CLAUSE 3, SECTION 8, ARTICLE I, OF THE FEDERAL CONSTITUTION?

The contention that the tax violates the Federal Constitution is also answered adversely to plaintiff by the decision in the case of L. B. Smith Aircraft Corp. v. Green, Supra. The purchase or rental of equipment is not interstate commerce. When equipment, is rented for the purpose of hauling the goods of the lessee and is incidentally used for the transportation of some cargoes of freight as a contract carrier, there is nothing in the Federal Constitution or decisions of the United States Supreme Court which exempts the rental agreement from state taxation. Plaintiff relies largely upon the case of *Central Greyhound Lines v. Mealey,* 334 U. S. (sic) 92 L. Ed. 1633, 68 S. Ct. 1260. That case holds that a state may not tax the entire gross receipts of a common carrier between points within the state by a route which lies partly in another state, but that such a tax may be laid upon that proportion of the gross receipts which the mileage within the taxing state bears to the entire mileage of the movement.

In the Mealey case the tax was one imposed directly upon the receipts of the common carrier for services rendered in the movement of persons and property. In the case at bar, the tax is one imposed upon a rental agreement entered into in Florida between two citizens of Florida which applies to the movement of the leased vehicles regardless of whether they are used in "common carriage" (which they are not), "contract carriage" (which they are sometimes), or for private use, (which they are sometimes). There is absolutely no relationship between the tax and the use to which the truck is put. The tax is not upon the carrier. It is not upon the act of carriage as such. It is not a tax upon, or measured by the charges made for carriage. It is a tax upon the leasing of the equipment which is something entirely different.

IS THE TAX A TAX ON INCOME IN VIOLATION OF SECTION 11, ARTICLE IX OF THE FLORIDA CONSTITUTION?

This question hardly merits discussion.

It has been recognized since the decision of the case of Lakeland v. Amos, 143 So. 744, that an excise tax measured upon the volume of sales of a business is not an income tax within the meaning of Section 11, Article IX, of the Constitution of Florida. Our whole sales and use tax structure is based upon this principle. The tax is not upon the income. It is upon the transaction whether it results in a gain or loss to the party taxed. It is therefore,

CONSIDERED, ORDERED, ADJUDGED, DECLARED AND DECREED

the determination by the Comptroller of the State of Florida that the transactions by which plaintiff leases to Lykes Bros., Inc., a corporation, motor vehicles used by Lykes Bros., Inc., in the transportation of property under the circumstances and in the manner hereinbefore described are subject to taxation under Chapter 212, Florida Statutes, does not violate any constitutional or statutory right of the plaintiff, and the collection of the taxes assessed upon such transactions is lawful and proper.

DONE at Tallahassee, Florida, this 30th day of October, A. D. 1962.

(s) Hugh M. Taylor

HUGH M. TAYLOR
CIRCUIT JUDGE

2. (R 18-22)

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA
JULY TERM, A. D., 1963

ELBERT MOORE, INC., a
Florida Corporation

Appellant,

-vs- NO. E - 77

HONORABLE RAY E. GREEN,
as Comptroller of the State
of Florida and Richard W.
Ervin, Attorney General,

Appellees.

Opinion filed September 17, 1963
Rehearing Denied October 14, 1963

On Appeal from the Circuit Court for Leon County,
Hugh M. Taylor, Judge.

WIGGINTON, J.

Appellant filed its complaint pursuant to Chapter 87, F. S., seeking a judicial declaration that it is exempt from the payment of a sales tax on rental receipts received by it from a lease of its trucks to Lykes Bros., Inc., a Florida corporation. From an adverse decree plaintiff has appealed.

The controlling facts in the case are not in dispute. Appellant is a resident corporation of Florida engaged in the business of leasing to others for an agreed rental trucks purchased by it for that purpose. It has entered into lease contracts with Lykes Bros., Inc., another Florida corporation. The trucks leased by Lykes are used in transporting from middle and western states to Florida property acquired by Lykes in such states and used by it in connection with its Florida operation. The

rental paid by Lykes is on a mileage basis which includes, maintenance, gasoline, oil and tolls paid by the trucks while traveling through the various states in the discharge of their assigned duties. Finding it economically wasteful to transport loads only from the middle and western states into Florida, and to return the trucks to their foreign destinations empty, Lykes Bros., Inc., secured certificates as a contract carrier from the various states in which its trucks operate. After transporting its own goods from western states into Florida, Lykes accepts goods from others to be transported for an agreed consideration by its leased trucks into the middle and western states on their return trips to their points of destination. The contract carrier business done by Lykes in utilizing the trucks leased from appellant is merely incidental to the primary use to which the trucks are put in transporting Lykes' own goods from the middle and western states into Florida. Appellee Comptroller has assessed a sales tax against appellant on the rentals it has received from the trucks leased by it to Lykes. It is appellant's position that the statute under which the tax is assessed contains a provision exempting it from payment of such tax, and that the Comptroller's action in assessing the questioned tax against it is illegal and void.

The Florida Revenue Act of 1949 imposes a tax of one per cent on the rental within the state of motor vehicles. (1) It is under the authority of this statute that the questioned tax has been assessed. Among the exemptions from taxation provided by the statute is one relating to vehicles and which is as follows: "Also exempt are vehicles and parts thereof used to transport persons or property in interstate or foreign commerce." (2)

It is the contention of appellant that the trucks leased by it to Lykes are engaged exclusively in the transportation of property in interstate commerce, and therefore the rentals received for their use are exempt from the tax under the above quoted exemption provi-

(1) Section 212.08 (3), F. S.
(2) Section 212.08 (7), F. S.

sion of the statute. The basis of appellant's position is that its liability for the payment of the tax should be controlled by the use to which its trucks are put by the lessee Lykes. Our Supreme Court had occasion to interpret the above quoted exemption provision of the statute in the case of Smith Aircraft v. Green. (3) The question involved in that case was whether the sales tax was validly assessed on the sale price of aircraft parts sold to persons regularly engaged in interstate or foreign commerce for incorporation into or use on or by their vehicles, not common carriers, which transport or move executives and other employees across state lines or in foreign commerce. The Supreme Court held that the exemption provision of the statute above quoted must be given a narrow as distinguished from a broad interpretation. In so holding the Court said:

> "We cannot say with certainty what the Legislature intended to exempt by using the language: parts of vehicles 'used to transport passengers or property in interstate and foreign commerce.' The broadest interpretation would include parts installed on any vehicle which at some time carried humans or property across a state line or to a foreign country. We think, however, when the entire statute is read and its basic purpose is considered, such a broad interpretation was not intended. It was the manifest purpose in enacting this law to tax as completely within its sphere as organic provisions would allow. e. g. Section 212.31 (3). A common understanding of the language 'passengers or property in interstate and foreign commerce' would lead to the conclusion that it was used in its narrower sense and relates only to what is more generally referred to as common carriers."

It is agreed that neither appellant nor its lessee, Lykes Bros., Inc., is a common carrier of persons or property, nor are the trucks in question used as a part of any system of common carriage. For a more comprehensive interpretation of the term "common carrier" as

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(3) L. B. SMITH AIRCRAFT CORP. v. GREEN, (Fla. 1957) 94 So. 2nd 832.

mentioned in the L. B. Smith Aircraft case, reference is made to the recent decision of this court in the Ruke Transport Line, Inc., case. [4] On the basis of the decision in Smith, supra, we must conclude that appellant does not qualify for an exemption from the sales tax on the rentals received by it under its leases with Lykes.

Even should the exemption provision of the statute be so broadly interpreted as to exempt from the sales tax both contract carriers as well as common carriers who transport persons or property in interstate or foreign commerce, it is our view that appellant would nevertheless not qualify for the exemption granted by the statute. The facts in this case disclose that the primary use of the trucks leased by Lykes from appellant is for transporting Lykes' personally owned property from middle and western states of this country into Florida for use in connection with its own business. The contract carriage phase of Lykes' operation is merely incidental to its principal corporate function, and was undertaken only for the purpose of minimizing the economic waste which would result if the trucks returned to the middle and western states empty and without a payload of any kind. The words "vehicles . . . used to transport persons or property" as contained in the exemption statute were intended to convey the meaning of a permanent rather than temporary or part-time use. The incidental use of the trucks for contract carriage would not bring the rentals received under the lease within the exemption provision of the statute.

We have considered the remaining points on appeal in which it is contended that the tax in question is invalid as an imposition upon interstate commerce and as an income tax, both in violation of the Florida and Federal Constitutions. We find these contentions to be without substantial merit. The decree appealed is accordingly affirmed.

STURGIS, CHIEF JUDGE, and CARROLL, DONALD J., CONCUR.

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[4] RUKE TRANSPORT LINE, INC. v. RAY E. GREEN, as Comptroller. Case No. E-288, Opinion filed September 10, 1963. Not yet reported.

3. (R 36)

ELBERT MOORE, INC., a Florida corporation, Petitioner,

v.

Honorable Ray E. GREEN, as Comptroller of State of Florida, Respondent.

No. 33074.

Supreme Court of Florida.
July 8, 1964.

Rehearing Denied Sept. 10, 1964.

Writ of Certiorari to the District Court of Appeal First District.

John R. Lawson, Jr., of Duncan & Lawson, Tampa, for petitioner.

James W. Kynes, Atty. Gen., and Gerald Mager, Asst. Atty. Gen., for respondent.

PER CURIAM.

Because of an apparent conflict of decisions we have heard the parties on both jurisdiction and merits. After oral argument and careful study of the record and briefs, we have concluded that the instant decision of the District Court of Appeal, First District, does not conflict with any prior decision of this Court or another District Court of Appeal. We conclude that the writ of certiorari was improvidently issued and it is, therefore, discharged, Fla. App., 156 So.2d 397.

It is so ordered.

DREW, C. J., and THOMAS, THORNAL, O'CONNELL and CALDWELL, J., concur.

APPENDIX C

1. Presentation of the apportionment question below:

a.

Paragraph E of Amendment to Complaint filed by Petitioner here, Plaintiff there, on April 7, 1961 in the instant case in the Circuit Court of the Second Judicial Circuit in and for Leon County (R-5):

> E. Said ruling is illegal by taxing rental from the rent of things outside of the State of Florida.

b.

Excerpt from page 5 of the Brief filed April 19, 1963, in the District Court of Appeal of Florida, First District, by the Petitioner here, Appellant there (R-24):

II

> DOES A FLORIDA TRUCK LEASE CLAUSE, BASING RENT ON THE NUMBER OF MILES DRIVEN, LINK THE LEASE TO BOTH INTRASTATE AND INTERSTATE USE, SO AS TO PREVENT FLORIDA FROM TAXING THE PORTIONS OF RENT CHARGED FOR OUT OF STATE MILEAGE?

c.

Point from page 4 of Petitioner's brief in Supreme Court of Florida (R-40):

> DOES A FLORIDA TRUCK LEASE CLAUSE, BASING RENT ON THE NUMBER OF MILES DRIVEN, LINK THE LEASE TO BOTH INTRASTATE AND INTERSTATE USE, SO AS TO PREVENT FLORIDA FROM TAXING THE PORTIONS OF RENT CHARGED FOR OUT OF STATE MILEAGE PER *GREEN V. WESTERN UNION* (Fla. 1960) 123 So. 2d 712.

d.

Paragraphs 5, 6 and 7 of the Petition for Writ of Certiorari addressed to the Supreme Court of Florida (R 26-31):

5. On the foregoing facts, the Court was presented with the following point of law in the words of Point II of our brief (Tr - 25):

> "DOES A FLORIDA TRUCK LEASE CLAUSE, BASING RENT ON THE NUMBER OF MILES DRIVEN, LINK THE LEASE TO BOTH INTRASTATE AND INTERSTATE USE, SO AS TO PREVENT FLORIDA FROM TAXING THE PORTIONS OF RENT CHARGED FOR OUT OF STATE MILEAGE?"

This point was posed by Paragraph E of the questions asked by our Complaint and Amendment to Complaint in the Circuit Court (Tr - 5) and the Circuit Judge dealt with this question in the second portion of his Declaratory Decree (Tr - 12, 13) wherein he attempted to distinguish *Central Greyhound vs. Mealey,* 334 U.S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260, and its apportionment principle. Also, our Petition for Rehearing focused solely on this Point II. (Tr - 21, 22)

Our brief in the District Court submitted only two other points, one factual, on which the District Court of Appeal agreed with us; and one legal, which was our Point III. The opinion of the District Court contains a discussion of our Point III, but this Petition concerns only our Point II below.

On this point of law the District Court of Appeal, First District, rendered the following decision or holding:

"... it is contended that the tax in question is invalid as an imposition upon interstate commerce ... in violation of the ... Federal Constitution. We find these contentions to be without substantial merit." (Tr - 21; 400 of 156 So. 2d.)

6. The same point of law was involved in the case of *Green v. Western Union Telegraph Co.,* decided by the Supreme Court of Florida, on the 29th day of June, 1960, rehearing denied on the 26th day of October, 1960. This decision was reported in 123 So. 2d, Page 712, and a copy of the decision is attached to this petition as Exhibit 1. The facts involved in Green vs. Western Union were as follows:

(a) Western Union engaged in the business of transmitting messages by telegraph between points within the State of Florida. (P. 714, 123 So. 2d)

(b) When a message was received in a Western Union office in Florida it was transmitted over its lines across the Florida-Georgia border to a reperforator center in Atlanta, Georgia, thence back over its transmission lines to a point of delivery in Florida. (P. 714, 123 So. 2d)

(c) Although the message originated and terminated at points entirely within the State, it was transmitted in the above described interstate travel as a result of a system established by Western Union in order to improve its efficiency. (P. 714, 123 So. 2d)

(d) The rates charged for the messages were collected in accordance with certain rate zone schedules based upon the mileage between the points within the State of Florida constituting the origin and delivery points of the message. (P. 714, 123 So. 2d)

(e) Insisting that the transaction was entirely intrastate the appellant Comptroller demanded payment of the gross receipts tax described in Section 203.01 F. S., calculated on the entire gross receipts of Western Union derived from messages transmitted between Florida points but in the manner described above. (P 714, 715, 123 So. 2d)

(f) Western Union insisted that the tax should be apportioned on a line mileage basis, that its operation was interstate for tax purposes and that it should not be required to pay a tax except in the proportion which

the mileage of its lines between Florida points and the Georgia border bore to the total mileage between Florida point of origin, thence to Atlanta and back to Florida point of delivery. (P. 715, 123 So. 2d.)

(g) The Chancellor agreed with Western Union and held in effect that the method of apportionment on basis of transmission line mileage was the proper basis on which to apportion the gross revenues of the appellee for purposes of paying the subject tax. (P. 715, 123 So. 2d.)

(h) Appellant Green, as Comptroller, asked the Supreme Court to reverse this decree. (P. 715, 123 So. 2d.)

(i) There was nothing to show that the gross receipts for transmission of the intra-Florida messages were in any manner related to the line mileage traveled by the messages. It was not shown that the rate charged was on a line mileage basis. (P. 717, 123 So. 2d.)

On these facts this Honorable Court ruled as follows:

"When a tax is measured by gross receipts we cannot envision an unlawful burden unless the interstate aspect of the operation contributes to the production of the gross receipts. When it does, the tax cannot be collected on the portion of the receipts produced by the operation beyond the borders of the taxing state." (P. 718, 123 So. 2d.)

If Western Union "... can at a subsequent hearing demonstrate a reasonable relationship between the out-of-state line mileage and the gross receipts for the messages here involved ... such amount should be deducted from the gross receipts collected from these messages in arriving at a tax base." (P. 719, 720, 123 So. 2d.)

7. The decision of the District Court of Appeal First District, which petitioner seeks to have reviewed, is in direct conflict with the *Green vs. Western Union* decision of this Honorable Court.

In each case, the tax was leveled against essentially the same thing. *Western Union* involved in the words of the statute "gross receipts", Sec. 203.01 F. S., from telegrams, our case involved in the words of the statute "gross proceeds", Sec. 212.05 (3) F. S., from leases. In *Western Union* this Honorable Court said if there was a "... reasonable relationship between out-of-state line mileage and the gross receipts ..." the out-of-state portions would have to be deducted from the tax base. In our case, there is a perfect relationship between the out-of-state mileage and the gross proceeds because rent is paid on a mileage basis. (Tr - 17, P. 398 of 156 So. 2d.) Yet the District Court refused to require apportionment. There is no reconciliation of the District Court ruling with this Honorable Court's ruling in *Western Union*. It is out of harmony. *Western Union* says there is an unlawful burden if ..." the interstate aspect of the operation contributes to the production of the gross receipts." (P. 718, 123 So. 2d.) Patent on the fare of the published opinion in our case is the fact that the interstate aspect of the operation contributes to the gross proceeds because "The trucks leased by Lykes are used in transporting from middle and western states ... the rental paid by Lykes is on a mileage basis ..." (P. 398 of 156 So. 2d.) Yet, on P. 400, future students of the problem of interstate taxation will read that "... it is contended that the tax in question is invalid as an imposition upon interstate commerce ... in violation of the Federal Constitution. We find these contentions to be without substantial merit." (Tr - 21)

This does more than create instability and confusion. It imposes two different standards and principles of law on two tax statutes, which are for present purposes analogous. Because of the reasons and authorities set forth in petitioner's brief, including *Central Greyhound vs. Mealey* 334 U. S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260, which was analysed by *Western Union* and which the Declaratory Decree spells out (Tr 12, 13) was the basis of our contention on the interstate taxation question, it goes without saying that we submit the

decision hereby sought to be reviewed is erroneous and that the conflicting decision of this Honorable Court is correct and should be approved by this Court as the controlling law for the State of Florida.

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2. Clarification that rent is paid only on a mileage basis:

a.

The Declaratory Decree to mileage as only being part of the rent basis (R-11):

> Plaintiff is paid by Lykes Bros., partly on mileage basis, the rental covering all maintenance, gasoline and oil for the trucks and even tolls paid.

b.

Paragraph 2 of the Complaint caused this confusion (R-1):

> 2. The said Lessee leases said motor vehicle equipment from the Plaintiff for a certain rental fee each month, plus a certain fee for mileage each month, said fee including maintenance, repair, gas, oil, tolls and related charges accruing both within and without the State of Florida.

c.

Paragraph (1) of the Stipulation corrrected it (R-8):

> (1) Paragraph 2 of the Complaint was amended by an interlined deletion of the phrase "each month, plus a certain fee" from lines 2 and 3 thereof; Paragraph 2 as so amended was admitted by the Defendant Ray E. Green to be true and the Court recognized the deletion and admission.

d.

Assignment of Error 2 sought correction of this finding by the District Court of Appeal (R-16):

> 2. The Court erred in holding that the plaintiff is paid only "partly on mileage basis."

e.

The opinion of the District Court of then dealt with rent on the correct basis (R 18-19):

> The rental paid by Lykes is on a mileage basis which includes maintenance, gasoline, oil and tolls paid by the trucks while traveling through the various states in the discharge of their assigned duties.

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3. Inapplicability of Central Transportation Company vs. Z. D. Atkins:

Excerpt from pages 2 and 3 of the Petition for Writ of Certiorari filed on November 29, 1957 in Case No. 630, October Term, 1957, in the Supreme Court of the United States, Central Transportation Company, Appellant (sic) vs. Z. D. Atkins, Commissioner, etc., Appellee (sic):

QUESTIONS PRESENTED

1. Whether or not a local corporation,

(a) the owner of a number of tractor-trailer units;

(b) and a repair shop with facilities for maintenance of its vehicles; and which is

(c) engaged in the business of leasing repairing, maintaining, inspecting and servicing its trucks for regular use in commerce by a single lessee; and

(d) providing all over-the-road necessities, such as gasoline, oil, parts, repairs, permits, tolls, food and lodging for drivers while trucks are

(e) operated in, to and through the several states,

(f) for which lessee pays a substantial sum per mile as rental for such use and consumption, is engaged in such active participation and furtherance of interstate commerce as to be a part thereof.

2. Whether or not, in this case, petitioner's gross receipts earned from the lease of its tractor-trailer units used wholly in interstate transportation at a substantial rate per mile traveled is subject to a local privilege or gross receipts tax.

3. Whether or not the General Assembly of the State of Tennessee, in the passage of the Retailers' Sales Tax Act, intended to exempt from levy and collection sales and use tax upon the use and consumption of transportation facilities used regularly in, to and through the several states in commerce, in order not to impinge upon the Federal Constitution.

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4. Burdensome nature of the tax:

a.

Excerpt from the Complaint filed herein in the Circuit Court for Leon County, Florida on October 28, 1960 (R-2):

7. Each of said leased vehicles makes numerous trips across state lines in interstate commerce each and every year that said use has been in effect.

b.

Excerpt from the Amended Answer filed by Ray E. Green as Comptroller on April 3, 1961, concerning paragraph 7 of the Complaint (R-4)

7. Answering paragraph 7 the defendant admits the allegations thereof.